



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 14, 1994

Ms. Christine Rodriguez  
Staff Attorney  
Legal Services, 110-1A  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR94-173

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.<sup>1</sup> We assigned your request ID# 21194.

The Texas Department of Insurance (the "department") has received a request for information regarding Humana Health Plan of Texas, Inc. ("Humana"). Specifically, the requestor seeks a copy of the June 1993 Price Waterhouse Audit on Humana, including a copy of the executive summary. You do not object to release of the requested information, but defer to whatever third-party privacy or proprietary interests may lie in it.

Pursuant to section 552.305 of the Government Code, we have notified the third party whose interests are implicated by the request for information. In response, we have received a letter from Humana. Humana claims that section 552.110 excepts the requested information from required public disclosure. Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Humana claims that the information submitted to us for review constitutes "trade secrets."

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<sup>1</sup>We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added.]

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>2</sup>

We have examined the information submitted to us for review. The requested audit was prepared at the direction of the department by Price Waterhouse. The purpose of the audit was to assess Humana's record of denied and partially paid claims. Humana

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2; 306 (1982) at 2; 255 (1980) at 2.

advises us that the requested audit is known outside its business organization only by the department, which acquired the audit in the scope of its regulatory functions, and by the Bexar County Medical Society, which is prohibited by a confidentiality agreement with Humana from disclosing the audit. In addition, Humana advises us that distribution of the audit within the business organization was limited in an effort to maintain the audit's confidentiality. Humana further advises us that the audit contains information concerning Humana's contractual discounts and reveals information necessary to establishing the reliability of Humana's practice in denying or partially paying claims. Finally, Humana advises us that the cost of the audit was \$250,000 and that it is unaware of any legal means by which the audit could be obtained.

Nonetheless, we conclude that Humana has not made a prima facie case that the requested information constitutes trade secrets. The audit in essence is no more than a review of single events in Humana's business, *i.e.*, Humana's response to individual claims, and does not reveal information about "a process or device for continuous use in the operation of the business." Humana has not demonstrated that the audit amounts to any more than a compilation and analysis of single facts. Accordingly, we conclude that the requested information may not be withheld from required public disclosure under the trade secrets branch of section 552.110 and must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

A handwritten signature in black ink, reading "James E. Tourtelott". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

James E. Tourtelott  
Assistant Attorney General  
Open Government Section

JET/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 21194  
ID# 21337  
ID# 22913  
ID# 22991  
ID# 23231  
ID# 23813  
ID# 24799  
ID# 25366

cc: Dr. Marvin A. Berkowitz  
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(w/o enclosures)